No. 2417.

—IN THE—

United States Circuit Court of Appeals for the Ninth Circuit

IN THE MATTER
of
The Application of JOHN DENNETT, Jr., Et al., for a writ of Mandamus, directed to the Honorable WILLIAM H. SAWTELLE, District Judge of the United States District Court for the District of Arizona, and directed to said District Court.

BRIEF OF RESPONDENT.

BRIEF

In Support of Response to Motion for Leave to File Petition for Writ of Mandamus and for an Order to Show Cause.

Filed this.....day of....., 1914.

.....
Clerk.

Attorneys for Respondent,

GEORGE J. STONEMAN,
REESE M. LING, Phoenix, Ariz.
O. T. RICHEY,
BENTON DICK, Phoenix, Ariz.
J. E. MORRISON, Phoenix, Ariz.
R. E. MORRISON, Prescott, Ariz.

Phoenix Printing Company, Phoenix, Ariz.

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BRIEF OF RESPONDENT.

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In Support of Response to Motion for Leave to File Petition for Writ of Mandamus and for an Order to Show Cause.

We are instructed by respondent whom we have the honor to represent in this cause, to submit this brief in support of the response to the writ served upon him, upon the true merits of its case, laying aside such technical objections as might be raised.

We are heartily in accord with respondent in this view to the end that the rights of stockholders in the Arizona Mutual Savings and Loan Association and the Arizona Trust Company may be determined upon the merits and not upon any question collateral thereto.

SUMMARY OF RESPONDENT'S POSITION.

This suit was originally instituted by Charles W. Clark as a minority stockholder of the Arizona Mutual Saving and Loan Association in behalf of himself and all other stockholders of that association similarly situated, to the end that the transactions set forth in his bill of complaint between the Arizona Mutual Savings and Loan Association and the Arizona Trust Company

> "be annulled and declared void and held for naught and to the end that an accounting may be had between the two defendants above named and between the defendant Loan Association and your orator, and others similarly situated * * * that a Receiver be forthwith appointed to take possession of and to marshall the assets of defendant Loan Association * * * to determine the amounts due and owing from defendant Loan Association to your orator and other stockholders similarly situated * * * and for such other relief as to a Court of equity may seem proper." Folios 105-107 inclusive.

This suit is admittedly a stockholders' suit, brought in equity only because of the impossibility of securing the assent of the directors of either company to the bringing of the suit, and is

brought in a representative capacity, not as an individual, but in behalf of the corporation and of all stockholders in the corporation whose interests were jeopardized who were in any manner affected by the attempted consolidation of the Loan Association with the Trust Company; such consolidation it is alleged in the petition of Clark was void and beyond the

> "right, power or authority of the defendant Loan Association or majority of the directors thereof" * * * "in violation of his rights as a stockholder in defendant Loan Association and in violation of the obligation which said defendant Loan Association owed to all stockholders similarly situated, and in violation of the contract which then and now exists between your orator and other stockholders similarly situated, and the said defendant Loan Association." Folios 82 and 83.

It is further alleged in the complaint of Clark that the attempted transfer was

> "in reality a fraudulent scheme improperly to perpetuate the existence of the defendant Loan Association after it had in fact, as heretofore alleged, *become and was insolvent* and was in fact unable to perform and discharge its duties and obligations to its stockholders by reason of defendant Loan Association's insolvency, and by reason of the fact that said defendant Loan Association had suspended the operation of its said business and had conveyed or attempted to convey among its other assets, its good will to the said defeidant Arizona Trust Company

and had in other respects *violated, broken* and *destroyed its contract* with your said orator above named *and other stockholders similarly situated.*" Folio 84.

In the motion for leave to file petition for writ of mandamus and for order to show cause it is alleged in paraggraph VIII thereof,

"your petitioners who are exchanging stockholders (intervenors) alleged with particular reference to themselves that they have been induced to exchange their said stock by actual misrepresentations made to them by defendants in said cause and for that reason such exchanging intervenors "*sought a recission of the exchange of stock and a restoration to their original status as Loan Association stockholders, and as such Loan Association stockholders prayed to join with complainant in seeking the relief which said complainant sought.*" Folio 16.

The prayer of the Clark petition asks that the

"transactions herein set forth as made between the defendants above named may be declared to be annulled and of no force and effect, and that a restitution of *all* of the assets of the Arizona Mutual Savings and Loan Association from the defendant Arizona Trust Company be adjudged and decreed, and that an accounting between both of the above named defendants be had and taken and an accounting between defendant Loan Association and your orator and other stockholders similarly situated be ordered and decreed." Folio 109.

"and that the affairs of Defendant Loan Association be wound up, its assets marshalled as aforesaid and distributed to those found to be entitled thereto." Folio 110.

We submit that the funds of the Loan Association constitute a trust fund in the hands of those in control of its affairs for the benefit of those exclusively entitled thereto.

This is either a stockholder's suit, brought in a representative capacity for himself and all other stockholders similarly situated only because the corporation, for the reasons alleged in the petition is disqualified from suing, in which event and as would be the case if the suit had been in the name of the Corporation instead of a stockholder, the decree should have been in favor of the corporation and for the benefit of all of its stockholders, or

This is a suit brought by intervening stockholders, not in a representative capacity and not for the benefit of the corporation and stockholders, but for the redress of wrongs and the inforcement of rights not given to all stockholders; in this event and only in this event, plaintiff and intervenors in this action can be entitled to a decree for their personal benefit, in which other stockholders similarly situated did not share, or;

This is a creditors suit brought at the expense of and for the benefit of creditors, in which event such creditors as did not present their claims and share the expense of the litigation would not be entitled to the proceeds of the judgment.

If it is a stockholders' suit brought in a representative capacity, theoretically in the name

of and actually for the benefit of the corporation, all stockholders whether assenting or non-assenting, whether guilty or innocent of participation in the acts of the corporate officers sought to be set aside and by the decree declared void, are bound by the decree for the suit is by the Corporation through its stockholders, not only for all stockholders of the corporation but in effect is against the crporation itself, and it is apparent that a stockholder as a plaintiff cannot be held as bound by the terms of the decree and at the same time be precluded from sharing in the benefits.

Moreover the so-called final decree of February 27th, 1913, finds

> "that at or about the time (meaning the time when the pretended transfer of assets was made by the Loan Association to the Trust Company) *the defendant Loan Association was insolvent* and unable to meet its obligations to its stockholders as said obligations were accruing." Folio 276.

> And further provides
> "That each of said exchanging stockholders be and they hereby are *restored to their original position and status as stockholders of defendant Loan Association, and each of said exchanging stockholders is hereby deprived of his status as a stockholder in defendant Trust Company.*" Folio 281.

We assert, in view of these findings, that a distribution of the assets collected by the Re-

ceiver cannot be made to any stockholder of the Arizona Mutual Savings and Loan Association upon any other basis than that the original complainant and intervening stockholders should pro rate in the assets so collected by the Receiver as their respective interests as stockholders may appear to have been "*in the insolvent Loan Association at the time of the alleged attempted and void transfer,*" for upon what theory may the Receiver be directed to disregard these two findings in the decree and to pay to certain stockholders a fixed and definite sum without such ascertainment?

To permit any stockholder suing in a representative capacity for the corporation and its stockholders to be paid in full the book value of his stock as has been done in the decree of February 27th, 1913, would be to disregard the fact that they were stockholders in the *insolvent* Loan Association and take from the pocket of those for whose benefit this stockholders' suit was instituted a sum of money sufficient to pay in full those stockholders who were his representatives in the bringing of the suit. It is in effect and in fact the entry of a personal judgment in favor of a few stockholders who assume to act for all, and against those stockholders who, relying upon the declaration of the complainant that he was bringing the suit in their behalf, rested secure in the belief that their representative would treat them fairly and justly; this personal judgment so entered in favor of complainant and intervenors and against the other stockholders personally and individually was without process or notice save that given to the corporation of which they were members and for which the

suit was commenced, and this notwithstanding the fact that the contribution from the remaining and unpreferred stockholders comes from them as stockholders in an insolvent corporation to pay in full other stockholders in such insolvent corporation.

This decree was not within the issues of the allegations of the Clark bill of complaint which it must be remembered were adopted in their entirety by all of the petitioning intervenors, but was so clearly without the issues submitted that equity and good conscience made its modification imperative to the end that all stockholders for whom the original bill of complaint was filed should not only be bound by the judgment but should participate in its benefits; that no one or more stockholders of an insolvent corporation should be preferred over other stockholders in such corporation or over creditors of the Loan Association, and that the stockholders of the Loan Association should be, to use the phrasing of learned counsel for the petitioner. "restored to their original status as Loan Association stockholders." The allegation of insolvency in itself precludes the possibility of the intervenors obtaining preference under the decree, because of the fact that if the Mutual Company was insolvent defendant stockholders would have a right to a pro rata only in the assets remaining, whereas the decree, notwithstanding the allegation of insolvency, purports to prefer the intervenors to the extent of paying their subscriptions without depreciation caused by insolvency.

THIS IS NOT A SUIT BROUGHT BY A DEFRAUDED STOCKHOLDER TO SET

ASIDE A SUBSCRIPTION OF STOCK IN THE TRUST COMPANY, EXCEPT IN SO FAR AS THE SUIT IS BROUGHT TO DECLARE THE TRANSACTIONS BETWEEN THE TWO COMPANIES VOID AND FRAUDULENT AND REINSTATE STOCKHOLDERS OF THE LOAN ASSOCIATION TO THEIR ORIGINAL STATUS IN SUCH ASSOCIATION BEFORE THE VOID AND FRAUDULENT TRANSFER OF ITS ASSETS.

"It is a well established rule of law that a stockholders' suit to remedy a wrong done to the corporation must be in behalf of all of the stockholdtrs since they are all equally interested in the results of the suit. Accordingly the complainant must bring the suit in behalf of himself and such other of the stockholders as may care to come in."

Cook on Corporations, 6th Edition, pp. 734, page 2426.

"An injury done to the stock and capital by negligence or defeasance is not an injury to such separate interest, but to the whole body of stockholders."

Brickerhoff v. Bostwick, 88 N. Y. 52, 105 N. Y. 567; 1 N. E. 667.
Richmond v. Irons, 30 L Ed. 870.
Craig v. Gregg, 83 Penna St. 19.
Deviney v. Hart Coal Co., W. Vir. 68 S. E. 789.

It is held to be

"a fatal defect in the plaintiff's petition both original and amended that it seeks no recovery on behalf of the corporation but seeks a direct recovery of damages to the plaintiff, the statement not entitling him to such recovery."

Evans v. Brandon, 53 Tex. 56;
Howe v. Barney, 45 Fed. 668.

"Money or property recovered from directors or other persons in a suit in equity instituted by a stockholder on behalf of the stackholders, belongs to all of the stockholders and not the complaining stockholder; it goes to the corporation, the decree must be for the benefit of the corporation and not for the complaining stockholders."

Wallace v. Lincoln Savings Bank, 89 Tenn. 630;
Landis v. Sea Isle, etc., 53 N. J. Eq. 654;
Loewenstein v. Diamond Match Co., 94 N. Y. App. 383;
Thompson on Corporations, 6th Ed., pages 4490-91, 4560;
Thompson vs. Stan, 20 N. Y. Sup. 317;
Thompson on Corporations, page 4566.

The relations one with the other of stockholders of a Loan Association are peculiar and differ from the relations of stockholders in other corporations, in that the interest of each stockholder in such Loan Association is mutual and the value of each share of stock depends upon the

mutuality of the contract and upon the observance or non-observance of each other stockholder of his contract of subscription to stock in such an association. This value is influenced by the fact of whether or not, because of the failure to make stated payments any stockholders forfeit their interest inthe association, and the amount of money which may have been paid before such forfeiture comes to the Treasury of the company for the increasing of its capital under the head of "lapses." It depends also and varies because a borrowing stockholder may not only forfeit the amount which he has repaid on the sum borrowed, but the security as well, and by diminishing the number of those entitled to share in the assets and earnings, at the same time add to the value and amount of such assets.

> "If as a result of the suit money is recovered for the benefit of the company it goes into the corporate treasury as any other funds of the company, and inures to the benefit of all shareholders, those assenting to the suit and those dissenting, those innocent and those guilty. Although this may seem to outrage ones sense of propriety, yet in no other way can legal principle be satisfying and in no other way can so near an approach to perfect justice be attained. In such a case, however, where the money is eventually to be distributed among the share holdlers the court may order immediate payment to the plaintiff of his share or proportion."

Machen 1185—Cases cited.

"A shareholders' suit is brought for a wrong to the corporation which but for exceptional circumstances would be the only proper plaintiff. The complaining share holder should sue as a representative of the aggregate right of the share holders; that is to say, on behalf of himself and all other share holders similarly situated, and hence a bill filed on his own behalf alone would be dismissed.

Machen, pp. 1172—Cases cited.

"The bill may be maintained by one share holder on behalf of all the others, although some of the latter have acquiesced in the transactions complained of and would therefore be barred from appearing as plaintiffs themselves."

Machen, pp. 1172.

"Defects in the process or in service constitute the most unquestionable ground for vacation of judgment after the lapse of the term. If there is an entire absence of service of process, and this fact appears by the record or by such evidence as under the practice of the court where the judgment is entered is competent it may be vacated on motion at any time. Though process was served in some manner or was defective in form ond the judgment is not therefore absolutely void, it will generally be vacated on motion. While it is universally conceded that a judgment void for want of jurisdiction over the

person of the defendant may be vacated on motion, irrespective of the lapse of time, there is a wide diversion of opinion as to what judgments are void for this reason and as to whether the motion to vacate a judgment is a direct attack upon it so as t warrant the reception of evidence not found in the record, and perhaps inconsistent with that which is to be found there."

1 Freeman on Judgments, 4th Ed. pp. 97-98.
Cases cited: People vs. Green, 74 Cal. 103.
People vs. Mullan, 65 Cal. 396.
Ladd vs. Mason, 10 Ore. 308.
People vs. Pearson, 76 Cal. 403.
Ex Parte Krenshaw, 15 Peters 119.

"If complainant stockholders sue for the restoration of assets of the corporation which have been diverted by its unfaithful directors into their own hands or into the hands of stockholders or strangers in breach of their duty or trust, neither those assets nor any proportion of them can be restored to the complaining stockholders, but recovery must be had in behalf of the corporation, and a receiver will in a proper place be appointed to take charge of and administer them.

Thompson on Corporations, pp. 4560-4490 and 4491.
Thompson vs. Stanley, 20 N. Y. Sup. 317.

"It will frequently happen that a majority of the shareholders are in a fraudulent conspiracy against the rights of the minority. The minority or one of the minority suing for

himself and others in like situation with him may file the bill. Where the bill is thus filed it is not necessary that the share holders should be made party by name, nor is it an objection that some of the share holders have become adversely interested."

Thompson on Corporations, pp. 4566.

"Where the action is brought to undo frauds already committed and to restore to the corporation assets wasted, the action does not proceed in right of the stockholders but it proceeds in right of the corporation, and consequently whatever is restored accrues to the corporation, and the law at once attaches to it the character of a trust fund for the creditors of the corporation first, and for its stockholders next, in which all are to share ratably and in respect of which no one gets a preference over the other, not even the stockholder who takes upon himself the burden of prosecuting the suit which results in its restoration."

Thompson on Corporations, pp. 4491.
Slattery v. St. Louis & T. Co., 94 Mo. 217, 4 S. W. 79.

COUNSEL FEES.

We had insisted that this suit is a stockholders' suit brought in a representative capacity by the original complainant for himself and stockholders similarly situated, being stockholders of the Mutual Loan Association and as such entitled to all of the rights, privileges and prop-

erty as a stockholder in defendant Loan Association, including the right of complainant and intervenors to participate in all of the assets of defendant Loan Association and upon the distribution thereof to receive such, if any, property as may remain undisturbed as the property of defendant Loan Association after defendant Loan Association had discharged all of its obligations to its stockholders in paying off and discharging such stock therein as may have matured and become due and payable from said defendant Loan Association to the members entitled thereto. That complainant recognized the necessity of suing in such capacity and for such purposes is evidenced by the contents of Paragraph IV of his petition, folio 73.

In this capacity and seeking this relief the rule is well established that a stockholder being successful in the litigation should be allowed counsel fees out of the fund recovered; that is to say, all the stockholders of the corporation receiving the benefits of the litigation should share in the payment of the expenses incident thereto.

It was doubtless upon this theory and under this rule that the expenses of the litigation were sought to be allowed in the decree of February 27th, 1913. Nor can we believe it was ever the intention of the learned Judge presiding in the Court below on this date that counsel fees were to be paid out of the common fund belonging to all stockholders without requiring the original complainant and intervening stockholders to pro rate in such payment. That this has been done is evident from the terms of the decree of February 27th, 1913, allowing to each intervening

stockholder the amounts alleged by each intervenor to have been the total amount paid on account of the purchase price of stock.

If this is a stockholders' suit brought for the benefit of all stockholders, this expense should be paid out of the stockholders' common fund, thus reducing the share of each stockholder in the distribution of the remaining fund by an amount proportioned to the amount he has paid in. If this suit is a suit brought by individual stockholders, having an individual right accruing to them as distinguished from stockholders not named as intervenors, it seems too clear for argument that an amount should have been set aside from the fund aggregating the total amount paid in by all intervening stockholders, out of which fund recovered for their individual benefit they should be compelled to pay the expenses of litigation. Any other method would be equivalent to a personal action by the intervenors and the judgment against such non-intervening stockholders to be paid by them not only in the full amount, but including counsel fees (presumably due on account of individual contracts) as well as the ordinary expense of litigation, and this without reference to the rights of holders of matured stock, which matured stock as noted by reference to the bill of complaint above referred to is by Clark himself recognized as having a priority of lien upon the fund recovered and for which Clark sets up no claim. Folio 73-74.

We do not wish to be understood as contesting the amount of the decree of February 27th, 1913, allowed to the able and distinguished counsel who up to this date had participated in this

litigation, save upon the ground that such compensation should not and cannot be allowed except upon the theory that if allowed out of the common fund belonging to the corporation, stockholders of the corporation in whose name and for whose benefit the decree was rendered should not be compelled to participate in the payment of this compensation and be denied the benefits of the decree. We assert that there is a complete unanimity of authority that costs payable by the complaining stockholders are payable by them per capita and not pro rata, according to the amount of stock held by each.

Edwards vs. Bay State, etc., 130 Fed. 242.

It is stated in Cook on Corporations, 6th Ed., to be the rule that

> "Inasmuch as the suit is for the benefit of all of the stockholders, and inasmuch as the results of the suit belong and go to the corporation, it is right that the expenses of counsel fees and other disbursements of the suit should be paid by the corporation, provided the suit so instituted is successful. The proceeds of a stockholders' suit belong to the corporation, less a reasonable allowance for the plaintiff for his costs, disbursements and attorneys' fees."

Cook on Corporations, 6th Ed., Paragraph 879, page 3160-61.

Citing Fox v. Ehle, 108 Cal. 475.
Meeker v. Winthrop Iron Co., 17 Fed. 48.
Trustees v. Green, 105 U. S. 527.

Central R. R. Co. v. Pettus, 113 U. S. 116.
Forrester v. Boston Co., etc., 74 Pac. 1088.
4 Thompson on Corporations, Para. 4491.

On page 6 of the brief of petitioner is contained the statement

> "The complainant and intervenors represented all the stockholders of the Loan Association having representative character to bind all those of the same class." Citing Lamar v. Hall, 129 Fed. 79-83.

In view of the fact that the decree of February 27th, 1913, allowed to counsel for the petitioner a fee to be paid out of the stockholders' common fund, thus recognizing the suit was brought for all of the stockholders, and not for those of a class, we deem the following quotation from the opinion in Lamar vs. Hall supra to be particularly applicable to the facts of the case at bar, as follows:

> "It may be stated as a general and unquestioned principle that each client should compensate his own solicitor and that an attorney cannot make another person his debtor by voluntarily rendering services in his behalf without his express or implied consent. The cases which allow compensation to attorneys out of a trust fund are not in conflict with this principle, but are founded upon it, for they depend upon the principle of agency, the actual plaintiff being the representative of the beneficiary of the trust * * * only jointly interested with others in trust property who in good faith maintains for himself

and others interested like him, the necessary litigation to save it from waste and to secure its proper application is entitled to the reimbursement of his interest *as between solicitor and client out of the fund to be administered.*"

The fund to be administered in the case at bar is as we have before stated, either first the fund set aside in a sufficient amount to reimburse intervenors to the full extent of the amount by them paid in upon their stock subscription, or second, it is the common fund in which all stockholders, whether participating or non-participating, guilty or innocent of the acts complained of, are interested to the same extent as is the petitioner who sued in a representative capacity.

By this decision the Court was without jurisdiction, except upon the theory that this was a stockholders' suit brought for the benefit of all stockholders of the Loan Association, to allow counsel fees out of the general fund in fulfillment of an implied or expressed contract made by intervening stockholders to pay counsel out of the fund which might be recovered for their personal benefit.

In further support of our contention that the Court was without jurisdiction to enter the decree of February 27th, 1913, we refer to the case of Sullivan v. Stukey, 86 Fed. 491; Lewis v. Clark, 129 Fed. 570, and Toll v. American, etc., Society, 61 Fed. 446. These authorities were cited in support of the statement made by counsel

"that the insolvency of the Loan Association

terminated the contract between it and its members."

Before further quoting from this case, it seems an opportune time to again call to the attention of this Court the admission contained in the brief that the Loan Association was on the date of the attempted transfer of its assets, insolvent; we at this time again request the Court to consider the anomalous position occupied by a stockholder who claims the right under a decree not only to have expenses and counsel fees of his private litigation paid by other stockholders in the Loan Association, but, without regard to the rights of stockholders whose stock has matured and who have thus become creditors instead of stockholders (as admitted by Clark, the original petitioner), and other creditors, if any there might be, and with regard to the possible contingency of some of the intervenors having been borrowers from the stockholders' fund, to be paid the full amount of his investment in an admittedly insolvent corporation.

Returning to the cases cited, the case of Sullivan v. Stukey supra is a direct contradiction of this asserted right in that it holds that under any of the three contentions made in behalf of the rights of stockholders of an insolvent building and loan association all stockholders are on an equality. Lewis v. Clark supra, while sustaining the statement contained in the brief that the insolvency of a Loan association terminated the contract between it and its members, also contains the statement quoted from page 573 that

> "The share holders in associations of this character are not in the ordinary sense creditors, and if deemed creditors in any sense they are necessarily subject to all equities existing between themselves."

The case of Toll v. American, etc., Society, supra, in a concise and full opinion rendered by Judge Grosscup involving the direction of that Court regarding terms on which the borrowers of the association might repay their loans and also the claims which the Receiver should advance on like actions in case of compulsory foreclosure contains the following language:

> "The first question is whether he (the stockholder) is entitled to a credit for the amount of the assessments paid upon his stock. I think not. Such a credit practically would be paying par on his stock and *a preference over other stockholders to which clearly he is not entitled.*"

On page 7 of petitioners' brief in support of that portion of the decree of February 27th providing that all stockholders of the Loan Association should receive in full the amount they had paid into the failing enterprise, the somewhat novel suggestion is made that because the particular stockholders, suing as intervenors in the original complaint and adopting all of the averments of the original complaint, surrendered the benefits of their contracts with the insolvent Association, which contracts promised to pay them at maturity, approximately one thousand dollars for every six hundred dollars paid in, and also

surrendered the interest on their payments this generous concession to the rights of the other stockholders in the insolvent Loan Association should be considered as a sufficient contribution to the losses of the enterprise as to warrant the Court in repaying to them in full and exclusively all other sums paid in, less the amounts surrendered, and out of the common fund which, except for this remarkable claim of justification, would under all of the authorities upon which a stockholders' suit can be instituted go to all of the stockholders in proportionate amounts.

It is not surprising that even the recognized ability and industry of learned counsel for petitioner has been unavailing in the citation of a single authority to support this argument. Certain it is that the cases cited under this paragraph of the brief on page 8 do not support the contention. The citation given on this page of the brief will be found upon examination to deal with the rights of creditors one as against the other to payment out of a certain fund. As a matter of fact, while the original suit was by a perfect bill of complaint commenced by Clark, the original complainant suing as a stockholder for the benefit of all stockholders of the Loan Association who were injured by the void, fraudulent and attempted transfer by the Association to the Trust Company of its assets, each intervening petition, word by word and step by step departed from the result originally sought to be obtained, until by the so-called final decree of February 27th, 1913, the proceeding was transformed from a suit brought by the Corporation for the benefit of its stockholders, to a suit brought by stockholders as creditors for the re-

dress of a private wrong and the enforcement of a private right claimed to be not common to other stockholders.

So far as it may be determined from the pleadings and from the decree of February 27th, 1913, the only justification for this departure is based upon the claim that because those stockholders not named as intervenors did not permit their names to be used, they should for this reason be deprived of their status as plaintiffs and of their right to share in the benefits obtained by the decree. Not only is this true but they are burdened with the payment of several thousands of dollars expended in the employment of eminent counsel and unnecessarily expensive litigation for the individual benefit of those who at the most were merely formal parties to the suit.

The intervenors in this suit adopted all of the averments of the original bill of complaint. The intervening petitions were unnecessary except to confer upon the intervenors the right to assist in the control of the litigation. Especially is this true in the case at bar where the intervenors by adopting the allegations of the bill of complaint filed by Clark allign themselves as plaintiffs in the action.

The office and the rights of an intervenor in support of a proceeding in equity are well stated in the case of Brickerhoff v. Bostwick, 1 N. E. Rep. 667. This was an action commenced by plaintiff as a stockholder suing in his own behalf and for the benefit of other stockholders of a national bank in which other parties intervened. While this case is cited by us for the purpose of defining the rights of intervenors it is also applicable to the claim made by peti-

tioner that all stockholders of the Loan Association not intervening are barred by laches from claiming the right to participate in the decree, in that the case holds that the action being brought in a representative capacity, all stockholders as well as the nominal plaintiff were before the Court, and unless the action of the original plaintiff was barred by laches, the action on the part of those stockholders similarly situated would not be barred.

The case of Brickerhoff v. Bostwick, 1 N. E. 667, contains the following language:

> "The action was commenced by Theodore Brickerhoff, suing on his own behalf and for the benefit of the other stockholders of the bank; and therefore, for the purpose of the statute of limitations, the action must be treated as if all the stockholders were plaintiffs. The action is really the action of all the stockholders, as it was necessarily commenced in their behalf and for their benefit. It could not have been commenced by one stockholder for himself alone. It is true that at any time before judgment the original plaintiff, before the others were made parties, could have discontinued the suit, or could have settled his individual damages with the defendants, and have executed a release which would have been effectual as to him. But if he had prosecuted the action to judgment, then the judgment would have been for the benefit of all the stockholders, and he would then have ceased to have control over it, because the rights of the other stockholders would at once have attached

thereto. The bringing of the action by this original plaintiff did not prevent the other stockholders from bringing similar actions; but the moment a judgment should be recovered in one action for the benefit of all the stockholders, the proceedings in all the others would be stayed. Innes v. Lansing, 7 Paige, 583. In this case, therefore, it was not necessary that the other plaintiffs should have been joined as nominal plaintiffs. The suit could have gone to judgment without their presence as nominal plaintiffs, but the judgment would have been just as effectual and just as beneficial for them as if they had been actually named as parties plaintiff. The suit having been commenced for their benefit, in which full and adequate relief could have been given to them, their rights would not have been barred by any lapse of time if they had not come in as plaintiffs. There was no purpose in their becoming nominal plaintiffs, except that they might have some control of the action, and thus be present to protect and secure their rights, and to prevent a discontinuance of the action by the original plaintiff."

JURISDICTION OF THE COURT TO ENTER DECREE OF FEBRUARY 27.

"It is a general rule, well established that after a term has ended, all final judgments and decrees of the Court pass beyond its control unless steps be taken during that term by motion, or otherwise, to set aside, modify or correct them; and if errors exist they can

> only be corrected by such proceedings by a writ of error or appeal as may be allowed in a court which by law can review the decision. So strongly has this principle been upheld by this Court that while realizing there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered, and this is placed upon the ground that the case has passed beyond the control of the court." Bronson v. Schulten, 104 U. S. 410, 26 L. Ed. 797.

To this general rule there are well recognized exceptions to the effect that while the general rule is applicable to cases at law a judgment or decree which under the general rule has become final by the expiration of the term, may be modified after the term and purged of errors or reversed by proceedings for error in fact. The exception to the rule is stated by Mr. Justice Curtis in the case of Hendrickson v. Henckley, 17 How. 443, 15 L. Ed. 123, as follows:

> "A court of equity does not interfere with judgments at law unless the complainant has an equitable defense of which he could not avail himself at law because it did not amount to a legal defense at law which he was prevented of availing himself of by fraud or accident unmixed by negligence of himself or his agents."

Upon the question of the jurisdiction of the Court to enter the decree of February 27th,

1913, the position taken by respondent is as follows:

A Court only acquires jurisdiction according to the established modes covering the class of case to which it belongs, and an erroneous judgment can be attacked collaterally. One not a party to a judgment cannot appeal therefrom and it follows that such a one is not bound by the judgment because of the fact that he is not a party. Where one is sought to be bound by a judgment it must appear that he is a party, and if by the terms of a judgment it is sought to bind him by it he is a necessary party and as such should be brought into Court in order that he may have his day and have his rights litigated. Bare notice or actual knowledge of the pending litigation is insufficient, for where a party is necessary to the adjudication of a cause he must be brought into court by a process of the court. Under the decree in this case the judgment being for the personal benefit of the intervening stockholders and against the interests of those stockholders not intervening, we submit that such non-intervening stockholders were necessary parties not brought before the court by process or at least so far as they are concerned, the decree of February 27th cannot be considered a final decree because it could not be adjudicating their rights for the purpose of rendering a final judgment against them without their presence in court; as to such non-intervening stockholders the decree of February 27th, 1913, is interlocutory; the proceeding in this cause being equitable and the court having taken possession of the property for the purpose of conserving the interest of the petitioners and

those similarly situated, an order made by the court which does not so conserve the interest of all stockholders is made without jurisdiction. The petition is based upon equitable rights, the relief sought is equitable, the judgment of the court does not follow equity by preferring a portion of the stockholders of the same class as against the remainder. The judgment is in law rather than in equity and is therefore entered without jurisdiction.

> "A court has no power to render judgment respecting a mater not submitted to it for decision though such judgment is pronounced in an action involving other matters which have been submitted to it for decision and over which it has jurisdiction." Freeman on Judgments, 4 Ed. para. 120, page 185.

In an opinion by Mr. Justice Brewer the rule is stated to be that:

> "A judgment for the recvoery of the possession of real estate rendered in an action whose pleadings disclose only a claim for the possession of personal property cannot be sustained, although personal service was made upon the defendants."
>
> Reynolds vs. Stockton, 140 U. S. 254, 35 L. Ed. 464.

By the same reasoning the Court was without jurisdiction to render the decree of February 27th, because of the fact that the suit was brought by Clark in a representative capacity for all stockholders similarly situated; that is

to say, for all stockholders whose rights under the contract with the Loan Association had been impaired by the void, attempted transfer of the assets of the Loan Association to the Trust Company, and the decree purports to adjudicate the rights of petitioners and intervenors in their capacity as individuals, taking away from the corporation itself and stockholders similarly situated with the intervenors the benefits of the judgment.

The case of Reynolds v. Stockton supra involved the jurisdiction of the Court in a stockholders' suit brought for the purpose of securing the reconveyance of personal property from one corporation to the complaining corporation, to enter a judgment so affecting the issues presented by the petition as to adjudge also the return of all real property. It was held in this case that the Court had no jurisdiction to enter a judgment affecting the real property because such an adjudication was not within the issues of the suit and

> "the rule is universal that where defendant appears and responds only to the complaint as filed and no amendment is made thereto the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue." * * * * "The inquiry is, had the Court jurisdiction in the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials: First, the court must have cognizance o fthe class of cases to which the one to be adjudged belongs;

second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere and that its action is void with respect to persons who are strangers toits proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment."

In this case the language of Mr. Justice Campbell in Washington Hackett Co. v. Sickles, 65 U. S. 333, 16 L. Ed. 650-53, is quoted with approval as follows:

"The essential conditions upon which the exception of the res judisata becomes applicable are the identity of the thing demanded, the identity of the cause of the demand and of the parties in the character in which they are litigants."

Applying this rule to the case at bar we submit that the decree of February 27th, cannot bind the non-intervenors because of the fact that while there was an identity of the demand and of the parties in the character in which they were litigants as set forth in the petition of Clark there was no such identity of demand or of the parties litigant set forth either in the petition of the intervenors or in the judgment rendered for their especial and individual benefit.

To the same effect the rule is even more vigorously stated in U. S. v. Walker, 109 U. S. 267, 27 L. Ed. 927, as follows:

> "Although a court may have jurisdiction over the parties asd the subject matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void."

Citing with approval the language in the well known case of Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914, in which Mr. Justice Field after a review of the cases bearing upon this subject announced the decision of the Court as follows:

> "The doctrine invoked by counsel that when a Court has once acquired jurisdiction it has a right to decide every question which arises in the case and its judgment, however erroneous, cannot be collaterally assailed is undoubtedly correct as a general proposition but is subject to many qualifications in its application. It is only correct when the Court proceeds after acquiring jurisdiction of the cause according to the established modes covering the class to which the case belongs and does not transcend in the extent or character of its judgment the law which is applicable to it.
>
> "To a bill for the dissolution of a corporation and an accounting filed for the benefit of a single stockholder not on behalf of the rest, the other stockholders or their representatives must be made defendants."

Fosters Federal Practice, 4th Ed., p. 342.
Citing Watson v.U. S. Sugar Refining Co., 68 Fed. 769.

The case at bar among other things is an action for an accounting. The decree of February 27th directs an accounting. The original bill of complaint prayed for an accounting between the Loan Association, the Trust Company and stockholders of the Loan Association similarly situated with the complainant. In so far as the decree purports to direct an accounting for the benefit of all stockholders it is within the rule laid down in Fosters Federal Practice, supra. In so far as the decree purports to direct an accounting only as between the intervening stockholders and not on behalf of the rest, other stockholders or their representatives, under the above rule, must have been made defendants. This not being done the other stockholders affected by the decree have not had their day in court.

To the effect that a cause of action where the relief sought is personal as distinguished from general relief sought on behalf of all stockholders is a misjoinder to such an extent as will not permit a judgment in favor of the complaining stockholder not participated in by the other stockholders citation is made to Metcalfvs. American School Furniture Co., 108 Fed. 909. In this case a minority stockholder in the corporation sued in behalf of herself and other stockholders similarly situated to set aside an alleged transfer of property of the corporation in pursuance of conspiracy between its officers and the transferee where it is alleged the corporation

on demand has refused to bring suit and also seeks the recovery of treble damages under the anti-trust act. It is declared to be multifarious, since such damages are only recoverable in an action at law by the plaintiff as an individual and not as a stockholder, while the relief prayed for is in behalf of the corporation and if granted would inure to the benefit of all the stockholders.

> "In the absence of fraud or collusion an intervening defendant can ordinarily set up no defense of which the original defendant could not have availed himself, nor can an intervening complainant contest the general object of the suit."
>
> Fosters Federal Practice, 4th Ed., p. 673. Citing Forbes v. L. P. and Pacific Railroad, 2 Woods, C. C. A. 323.

ALL STOCKHOLDERS OF ARIZONA MUTUAL BELONG TO SAME "CLASS."

> "Upon general principles if the party named as plaintiff who sues in behalf of himself and others fails in his suits, those whom he represents must also fail, for the rights of those represented can rise no higher than those named as plaintiffs." Quinlin v. Meyers, 29 Ohio St. 500-10.

Conversely it must be true that the rights of intervenors are dependent upon the relief prayed for in the original suit, professedly in this case being brought for Clark and all other stockholders similarly situated; the intervenors

would be entitled to no other relief or to any higher relief than might have been granted had the suit been prosecuted in the name of Clark as nominal plaintiff on behalf of and for the benefit of stockholders in the Loan Association similarly situated. By the phrase "similarly situated" is meant not those stockholders who are the nominal parties to the suit but all stockholders who at the time of the commencement of the suit were similarly situated in their contractual relations with the Mutual Company as was Clark. If in this case the directors of the Loan Association, fraudulently and collusively combining with the directors of the Trust Company entered into a contract and agreement which from its inception was void as being a breach of the trust relation imposed upon them by virtue of their offices as directors, the entire transaction as is alleged in the bill became void, not only as to Clark but as to all who were stockholders in the Loan Association at the time of the alleged, attempted fraudulent transfer. Fro mthis point of view there could be no such thing as "assenting" or "non-assenting" stockholders because of the legal impossibility of an assent by either class of stockholders to an act void in law. Indeed we believe it may be stated as a rule which will not be denied by petitioner that his standing in this court of equity rests upon the statement contained in the pleadings that the suit is brought in a representative capacity for the benefit of the corporation and its stockholders.

Upon the authority of a statement made by counsel for intervenors in one of the briefs submitted during this litigation filed October 16th, 1912, marked for identification in the office of the

Clerk of the U. S. District Court, file "No. 53."

> "the admitted facts show that the acquisition of the assets of the Loan Association by the Trust Company was and is illegal. This in effect has been twice judicially decided in this cause, once by Judge Morrow and once by Judge Sloan."

This statement by counsel for petitioners is sustained by the decree of February 27th, in which it is found that the entire transaction between the directors of the Loan Association and the directors of the Trust Company was fraudulent and void. The petition of Clark upon its face is a disclaimer of any voluntary participation of any stockholder of the alleged fraudulent acts. There is no claim that the acts alleged to be fraudulent were voidable. On the contrary, the distinct allegation is that the transfer of the stock of all Loan Association stockholders was beyond the power of the Loan Association to effect under the contract between the stockholders and the Loan Association. That such attempted transfer was in breach of the trust relations which the directors of the Loan Association bore to its stockholders and was accomplished by such fraudulent misrepresentations as to render the transfer void ab initio.

The true test as to whether a suit should be brought by a stockholder in his individual right or in a representative capacity is said to be as follows:

> "Is the complainant affected only as every

other shareholder is affected, or is he affected in some manner peculiar to himself."

Machen on Corporations, para. 1152.
Converse v. United Shoe Co., 185 Mass. 422; 70 N. E. 444.
Miles v. N. Y., etc., Ry. Co., 176 N. Y. 119; 68 N. E. 142.
Lawrence v. Curtis, 191 Mass. 240.
Wells v. Dane, 101 Maine 67; 63 Atl. 3242.
Bigelow v. Calumet Mining Co., 155 Fed. 869.

In the case at bar under the facts pleaded, the interest of all stockholders of the Loan Association are affected equally. Any transfer of any portion of the assets of the Loan Association lessening the value of the stock of one stockholder must have a like effect upon the stock of every other stockholder and this whether the holder of stock assented or refused his assent to such transfer. Any misappropriation of the funds of the Loan Association by its officers had an equal effect upon the value of all stock. Every act of mismanagement entailing an unwarranted expenditure of money affected the rights of all stockholders and the value of all stock and in no manner are the intervenors affected except as every other shareholder is affected, unless indeed as results from the decree of February 27th, 1913, the shares of the intervening stockholders are unwarrantably and unduly enhanced in value by a distribution of all of the assets in the corporate fund to the intervenors and to the exclusion of the other share holders.

The original action commenced by Clark is predicated upon the assumption that the at-

tempted transfer of assets from the Loan Association to the Trust Company was void ab initio and deprived him and other stockholders of the Loan Association without respect to the class of stock held by them, of their rights as stockholders in the Association.

The intervening petitions attempt to place petitioners in a class by themselves resting only upon the fact either that they never exchanged their stock for stock of the Trust Company, or that having exchanged they had rescinded their action. The intervenors pray for and are granted relief in an action accruing to themselves personally, arising out of an action necessarily based upon the claim that the entire transaction was void. We submit that the cause of action attempted to be sued upon by the intervenors results in a joinder of a cause of action accruing to themselves personally with the cause of action brought by Clark on behalf of the Company and other stockholders against the same parties defendant. That this cannot be done and the Court was without jurisdiction to enter a decree in favor of the intervenors personally and against the corporation and non-intervening stockholders. That the authority to enter such a decree, the effect of which as we have before stated is a personal judgment in favor of some stockholders as against the other stockholders in a suit against the same defendant corporation, must rest upon the issuance of a valid process giving to such non-intervening stockholders their day in court. That such a joinder of causes of action is multifarious and cannot be maintained in a Court of Equity. In support of this statement we cite:

Cook on Corporations, 6th Ed., para. 739, pages 2462-2463.
Whiteney v. Fairbanks, 54 Fed. 985.
Farrow v. Holland Trust Co., 74 Hun. 585.
Metcalf v. American School Furniture Co., 108 Fed. 909.

In concluding this Brief we earnestly join with the petitioner and his counsel in praying the judgment of this Court that Charles W. Clark, who brought the original action against the defendant corporations, and the intervening petitioners who adopted the bill of complaint filed by Clark in its entirety, should be granted the relief in that bill prayed for to the end that petitioner Clark and all other stockholders of the Loan Association whose representative he was, and intervenors should be restored to the status which on the date of the attempted transfer of assets from the Loan Association to the Trust Company they occupied as stockholders in the insolvent Mutual Loan Association; that the assets fraudulently, unlawfully and in excess of the powers conferred upon the Board of Directors of the Loan Association attempted to be transferred to the Trust Company shall be marshalled by the Receiver and distributed to the persons properly entitled thereto; that the creditors, if any, of the Loan Association shall be paid, the surplus distributed to its stockholders as their respective interests may appear, and the remainder, if any, be used in the payment of debts of the Trust Company first and distributed to the stockholders of the Trust Company thereafter, which stockholders, according to the prayer of the Clark petition, and because

the attempted transfer of the assets of the Loan Association was an act void ab initio, excludes all stockholders of the Loan Association whose stock was by the void act attempted to be transferred.

Respectfully submitted,

GEORGE J. STONEMAN,
Phoenix, Arizona.
REESE M. LING,
Phoenix, Arizona.
O. T. RICHEY,
Phoenix, Arizona.
BENTON DICK,
Phoenix, Arizona.
J. E. MORRISON,
Phoenix, Arizona.
R. E. MORRISON,
Prescott, Arizono.
Attorneys for Respondent.